IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0432
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
STEVEN BRADLEY RADY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20050005

Honorable Kenneth Lee, Judge

AFFIRMED

Robert J. Hooker, Pima County Public Defender
By John F. Palumbo
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 Twelve jurors found appellant Steven Bradley Rady guilty of misdemeanor assault and nine felonies: second-degree burglary with a sexual motivation, robbery, attempted sexual assault, kidnapping, theft of a credit card, and two counts each of sexual assault and computer tampering. The trial court sentenced him to time served for the misdemeanor conviction and to a combination of concurrent and consecutive, presumptive prison terms totaling 22.5 years for all but one of the felonies. For attempted sexual assault,

the trial court placed Rady on lifetime sex-offender probation, to commence upon his release from prison.

¶2 Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967); *Smith v. Robbins*, 528 U.S. 259, 120 S. Ct. 746 (2000); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating that he has read the entire record without finding any arguable legal issues to raise on appeal. Counsel has complied with the requirements of *Clark* by "setting forth a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." 196 Ariz. 530, ¶ 32, 2 P.3d at 97. Counsel asks us to search the record for fundamental error. In a supplemental pro se brief, Rady contends the trial court's imposition of consecutive, seven-year sentences for his two sexual assault convictions, to be followed by lifetime probation for attempted sexual assault, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003). Rady also contends his several sexual offenses should have been considered one act rather than separate crimes.

¶3 *Davis* is the only authority Rady cites in support of his position. In *Davis*, our supreme court held, first, that the prohibition against cruel and unusual punishment in article 2, § 15 of the Arizona Constitution is coextensive with the federal prohibition created by the Eighth Amendment. 206 Ariz. 377, ¶ 12, 79 P.3d at 67-68. Second, overruling its earlier opinion in *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996), the court held that,

> in assessing the constitutionality of a sentence, the reviewing court should examine the crime, and, if the sentence imposed is so severe that it appears grossly disproportionate to the offense,

> the court must carefully examine the facts of the case and the circumstances of the offender to see whether the sentence is cruel and unusual.

Davis, 206 Ariz. 377, ¶ 34, 79 P.3d at 71.

¶4 In *Davis*, the twenty-year-old defendant had been sentenced to serve fifty-two years in prison for having had "non-coerced sex with two post-pubescent teenage girls" aged thirteen and fourteen. *Id.* ¶ 36. The evidence showed the teenagers had "sought Davis out and willingly participated in the criminal acts." *Id.* ¶ 43. The jurors, the trial judge, the author of the presentence report, and the mothers of both victims all believed Davis's sentences were excessive, and the supreme court concluded that, under the facts and circumstances of that case, the statutorily mandated sentences were so disproportionate to Davis's offenses as to shock the conscience of the court and the community. *Id.* ¶¶ 36, 49.

¶5 The facts and circumstances of Rady's crimes are entirely different. As described in counsel's opening brief and viewed in the light most favorable to upholding the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence here established that Rady had surreptitiously entered the victim's apartment, forced the victim to give him her bank card and personal identification number, bound her hands, pushed her onto a bed face down, pulled down her pants and underwear, and sexually assaulted her.[1]

[1]The victim testified her attacker was holding a knife, although no knife was ever recovered, and the jury's verdicts finding Rady not guilty of armed robbery and aggravated assault suggest his use of a knife was not proved beyond a reasonable doubt.

¶6 In Rady's opening brief, counsel summarized the victim's description of the assaults as follows:

> He then began to lick her anal and genital area, and she told him to stop and began to cry. He told her to relax, and then unsuccessfully attempted to penetrate her anus with his penis. He then licked her genital area again, and penetrated her vaginally with his penis.

Before leaving her apartment, Rady pulled over the victim's head what turned out to be a pair of sweat pants. The victim felt him start to tighten the sweat pants around her neck and believed she was about to be strangled.

¶7 Rady stole $120 in cash from the victim's purse and several pieces of her jewelry. He subsequently used her bank card to withdraw over a three-day period a total of $600 from two different automated teller machines, and he made an unsuccessful attempt at a third machine. The victim was able to identify Rady as her assailant from a photograph taken at one of the bank machines where he had used or attempted to use her bank card.

¶8 Police officers executing a search warrant at the Phoenix apartment Rady shared with his girlfriend found the victim's bank card and jewelry. They also found clothing like that the victim described her assailant as having worn and like that worn by the person photographed using the victim's bank card at three automated teller machines. Confronted with that and other evidence the officers had found, Rady eventually confessed to having entered the victim's home and sexually assaulted her.

¶9 In addition, according to the presentence report, one month before Rady committed the crimes in this case, he had entered the home of another victim whom he also sexually assaulted. As a result of that incident, he was convicted in a separate case,

CR20044625, of second-degree burglary, sexual abuse, and two counts of sexual assault. Rady was sentenced simultaneously in the two cases, so those convictions were not used to enhance his sentences in this case, but the trial court ordered the sentences in this case to be served consecutively to the combined sixteen-year terms imposed in that case.

¶10 Rady's claim that the consecutive nature of some of his sentences resulted in cruel and unusual punishment finds virtually no support in the law. Section 13-708, A.R.S., provides that multiple sentences imposed at the same time "shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence." Moreover, A.R.S. § 13-1406(C) expressly requires that a sentence imposed "for a sexual assault shall be consecutive to any other sexual assault sentence imposed on the person at any time."[2] Mandatory compliance with § 13-1406(C) alone accounted for fourteen of the 22.5 years Rady was ordered to serve in this case.

¶11 The trial court grouped Rady's sentences for burglary, robbery, and kidnapping, ordering those three to be served concurrently with each other, and did the same with his convictions for theft and two counts of computer tampering. Because each group of convictions represented conduct entirely distinct and severable from the sexual assaults

[2]In his supplemental brief, Rady appears to state that his consecutive sentences for sexual assault both were and were not mandatory: "My consecutive sentences for sexual assault were also mandatory under § 13-1406(c), and they should also be held to be cruel and unusual punishment. In the *Davis* case, the court also said that sentences for sexual assault under § 13-1406(c) do not have to be consecutive, and my judge ran them consecutive because he thought he had to. *State v. Davis*, ¶ 40." We disagree with Rady's apparent interpretation of *Davis*, as did defense counsel at sentencing. Section 13-1406(C) plainly requires that multiple sentences for sexual assault be consecutive.

and from the other grouped convictions, consecutive sentences between the groups seem entirely appropriate. *See, e.g.*, *State v. Williams*, 182 Ariz. 548, 560, 898 P.2d 497, 509 (App. 1995) (because defendant could have committed sexual assaults without also committing armed robbery and because robbery exposed victim to additional harm, consecutive sentence for robbery was appropriate).

¶12 Rady's victim spoke at his sentencing hearing and described the profound traumatic effects his actions had had on her life. She asked the court to imprison him for forty years or the maximum possible time for what he had done to her. Had the court chosen to order all eight of Rady's presumptive sentences to be served consecutively, they would have totaled 33.5 years' imprisonment. And, as the supreme court noted in *Davis*, normally the consecutive nature of sentences will not be considered a factor in a proportionality inquiry. 206 Ariz. 377, ¶ 47, 79 P.3d at 74. "A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

¶13 Applying *Davis*, we simply do not find the concurrent and consecutive, presumptive sentences imposed upon Rady to be "so severe that [they] appear[] grossly disproportionate to the offense[s]." *Davis*, 206 Ariz. 377, ¶ 34, 79 P.3d at 71. We find that Rady's case bears almost no resemblance to *Davis*, the sole authority Rady has cited as support for his argument.

¶14 Rady also complains that the trial court made his lifetime probation consecutive to his prison sentences because it mistakenly believed it had to do so. Rady has not cited any place in the record that supports his factual assertion, and we have found none.

We note, however, that making a probationary term concurrent with a prison term would be pointless. We can conjure no reason to require a defendant to comply with conditions of probation while the defendant is still incarcerated.

¶15 Finally, Rady argues his sexual assaults on the victim should have been considered one offense instead of separate offenses because they occurred so closely in time. He acknowledges the holding of *Williams*, 182 Ariz. at 562, 898 P.2d at 511, that "the elements of fellatio, cunnilingus, vaginal intercourse, digital intercourse and anal intercourse are different since each act is factually distinct from the other." Here, no less than in *Williams*, Rady "could have committed each of the different assaults without committing the others," and "each different act exposed the victim to a different type of harm." *Id*. Because the assaultive acts were distinct, regardless of how little time separated one from another, we reject Rady's claim that they should have been viewed as a single offense.

¶16 We do not find Rady's sentences to be excessive, grossly disproportionate to his crimes, nor cruel and unusual punishment. We have reviewed the record for fundamental error and have found none. We therefore affirm Rady's convictions and the sentences imposed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge